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CITATIONS

216-062—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1107

UNITED STATES OF AMERICA, APPELLANT

v.

EUGENE FRANK ROBEL

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

OPINIONS BELOW

The district court's memorandum opinion dismissing the indictment (Motion to Affirm, App. A, pp. 19–23) is not yet officially reported. The court of appeals wrote no opinion in certifying the appeal to this Court.

JURISDICTION

On October 4, 1965, the district court dismissed the indictment on the ground that active and knowing membership in a Communist-action organization and specific intent to further its unlawful purposes are essential elements of the offense defined in Section 5(a)(1)(D) of the Subversive Activities Control Act

of 1950, 50 U.S.C. 784(a)(1)(D), which appellee was charged with having violated. The government filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on November 2, 1965. On the government's unopposed motion, the court of appeals certified the appeal to this Court on February 28, 1966. Jurisdiction of this Court is invoked under 18 U.S.C. 3731 in that the district court's order dismissing the indictment was "based upon the * * * construction of the statute upon which the indictment * * * is founded."

QUESTIONS PRESENTED

1. Whether active membership in a Communist-action organization, knowledge of its unlawful purposes and specific intent to further them are essential elements of the offense defined in Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1)(D).

2. Whether, if the first question is answered in the negative, Section 5(a)(1)(D) is constitutional.

STATUTE INVOLVED

The Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. 781 *ff.*, as amended, provides in pertinent part:

> Sec. 3. For the purposes of this title—
>
> (3) The term "Communist-action organization" means—
>
> (a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is

substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; * * *

* * * * *

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

* * * * *

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, raiload, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated by the Secretary of Defense pursuant to section 5(b) of this title and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

* * * * *

Sec. 5(a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U.S.C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.

(2) * * *

* * * * *

(b) The Secretary of Defense is authorized and directed to designate facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall promptly notify the management of any facility so designated, whereupon such management shall immediately post conspicuously notice of such designation in such form and in such place or places as to give notice thereof to all employees of, and to all applicants for employment in, such facility.

> Such posting shall be sufficient to give notice of such designation to any person subject thereto or affected thereby. Upon the request of the Secretary, the management of any facility so designated shall require each employee of the facility, or any part thereof, to sign a statement that he knows that the facility has, for the purposes of this title, been designated by the Secretary under this subsection.

STATEMENT

On May 21, 1963, appellee was charged in a one-count indictment filed in the United States District Court for the Western District of Washington with having violated Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1)(D). The indictment alleged (1) that a final order of the Subversive Activities Control Board in which the Communist Party of the United States of America was ordered to register as a "Communist-action organization" had been outstanding since October 20, 1961; (2) that the Secretary of Defense had, on August 20, 1962, designated the Todd Shipyards Corporation in Seattle, Washington, as a defense facility under Section 5(b) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(b); (3) that appellee had thereafter "unlawfully and willfully engage[d] in employment" at the Todd Shipyards Corporation; (4) that appellee had done so "while at the same time being a member of the Communist Party of the United States of America"; (5) that he had "knowledge and notice" of both the order of the Subversive Activities Control Board and the designation of the Secretary of Defense.

Appellee challenged the constitutionality of Section 5(a)(1)(D) and moved to dismiss the indictment on constitutional and other grounds. The material issues were argued orally and in briefs submitted to the district court. On October 4, 1965, the district court dismissed the indictment with a memorandum opinion which noted that the indictment had failed to allege that appellee was "an active member of the Party, or that he is acting or has acted or intends to act to further the unlawful purposes of the Party" (Motion to Affirm, App. A., p. 21). The court observed that "[t]he government argues that it does not have to prove these elements" (*ibid.*), and that the "government contends without reservation that the indictment need not allege nor prove the defendant was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes" (Motion to Affirm, App. A, p. 23). The court held, however, that because constitutional difficulties would be presented if the statute were construed in accordance with the government's position, "the requirements of active membership and specific intent must be deemed implicitly in the statute" (*ibid.*).

ARGUMENT

1. The district court's opinion reveals, we believe, that the district court's order dismissing the indictment was "based upon the * * * construction" of Section 5(a)(1)(D)—"the statute upon which the indictment * * * is founded"—within the meaning of the Criminal Appeals Act, 18 U.S.C. 3731. The cen-

tral difference between the view urged by the government and the view adopted by the court concerned the essential elements of the statutory offense. The government argued that Congress did not intend to require proof of active membership, knowledge of unlawful purposes, or specific intent to further such purposes; the court held that, properly construed, Section 5(a)(1)(D) renders employment in a defense facility criminal only if the employee is an active member of a Communist-action organization with knowledge of the organization's unlawful purposes and with the intent of furthering these purposes in his employment.

In sum, we disagree with the district court not as to what need be alleged in the indictment nor as to the meaning of any particular allegation, but with respect to the interpretation of the statute. In this case, as in *United States* v. *Braverman,* 373 U.S. 405, the government represented to the district court that it did not intend to prove an element which was not alleged in the indictment and which the court believed to be essential to the commission of the statutory offense. See 373 U.S. at 405–406. Although the district court's opinion occasionally alludes to the indictment's failure to make specific allegations regarding the contested elements, the decision rests, we submit, entirely on a construction of Section 5(a)(1)-(D). Consequently, the government's appeal was properly certified to this Court under 18 U.S.C. 3731.

2. Appellee has moved to affirm the judgment of the district court summarily not for the reasons given by the court—*i.e.*, the construction of Section

5(a)(1)(D)—but on constitutional grounds. While we agree that the constitutional questions are not insubstantial, particularly in light of this Court's recent decision in *Elfbrandt* v. *Russell,* No. 656, this Term, decided April 18, 1966, we submit that both the statutory and constitutional issues warrant plenary consideration.

The statute involved in this case makes it a criminal offense for a member of an organization which has been determined by the Subversive Activities Control Board to be a "Communist-action" organization to seek, accept or hold employment in any facility designated by the Secretary of Defense as a "defense facility." The form and language of Section 5 is very similar to the section immediately following it in the Subversive Activities Control Act of 1950—Section 6, 50 U.S.C. 785. In *Aptheker* v. *Secretary of State,* 378 U.S. 500, this Court refused to read Section 6, which prohibited the use of passports by members of Communist organizations, as incorporating the elements which the district court read into Section 5 in this case. Notwithstanding the fact that the absence of these elements rendered the statute unconstitutional, this Court held that the language and legislative history of Section 6 foreclosed any such limiting construction. 378 U.S. at 511, n. 9. We submit the same reasons compel the conclusion that it was not Congress' desire to limit the prohibitions enumerated in Section 5 to persons who know of and have the specific intent to further the unlawful purposes of the Communist organizations to which they belong.

The district court in this case imported into Section

5(a)(1)(D) the active membership, knowledge and specific intent requirements which this Court found in the "membership clause" of the Smith Act (18 U.S.C. 2385) in *Scales* v. *United States,* 367 U.S. 203, 221–228. In so doing, it not merely construed Section 5 contrary to its language and history, but it rendered the entire statutory provision superfluous. For, if all the elements needed to prove a violation of the "membership clause" of the Smith Act must be proved to establish a violation of Section 5 of the Subversive Activities Control Act of 1950, the latter statute serves no apparent purpose. We submit that it was Congress' intention to bar from employment in defense facilities, in the interest of national security, not merely individuals who could be successfully prosecuted under the membership clause of the Smith Act, but any person who is a member of a Communist-action organization and who knows that the organization has been found to be such by the Subversive Activities Control Board and that the facility where he is employed or seeks employment has been specially designated by the Secretary of Defense.[1]

[1] We note, in addition, that the three elements deemed essential by the district court are by no means inseverable. Section 5(a)(1)(D) might be construed to require proof of one or, at most, two of these elements—*i.e.*, active membership and knowledge of unlawful purposes—but not proof of specific intent to further those unlawful ends. For purposes of this appeal, we concede that the essential characteristics of membership must be alleged and that the instant indictment, which failed to specify any of these three contested elements, was properly dismissed if any of them is a required ingredient of the offense. Nevertheless, since the district court decided that each of these ingredients was a prerequisite to conviction under

3. If the Court agrees with the construction of the statute which we urge, it will be, of course, free on this appeal to go on to consider appellee's constitutional challenges to Section 5(a)(1)(D), so construed. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 329–330; *United States* v. *Spector*, 343 U.S. 169, 172; Stern & Gressman, *Supreme Court Practice* (1954 ed.) p. 26. The constitutional issues plainly warrant more than summary consideration. Unlike *Aptheker* v. *Secretary of State*, 378 U.S. 500, on which appellee relies (Motion to Affirm, pp. 5–8), this case does not involve a liberty as "basic in our scheme of values" (*Kent* v. *Dulles*, 357 U.S. 116, 126) as the right to travel. In Section 5(a)(1)(D) Congress was attempting to protect national security by limiting access to facilities in which classified defense information is available. Access to such locations cannot be compared to the freedom to travel abroad, and the governmental interest in regulating such access is obviously much greater than the interest in restricting travel by those who may be disloyal.

Nor do any of appellee's subsidiary constitutional claims warrant summary affirmance. The argument that appellee cannot constitutionally be bound by the administrative finding of the Subversive Activities Control Board with respect to the character of the Communist Party (Motion to Affirm, pp. 11–13, 14–17) is inconsistent with *Yakus* v. *United States*, 321

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the statute, and since the same issues would recur if the dismissal were affirmed on any one of the district court's grounds, it would seem appropriate for the Court to determine, on this appeal, which, if any, are necessary elements of the crime.

U.S. 414, and *Cox* v. *United States*, 332 U.S. 442. Moreover, that contention is an inappropriate ground on which to affirm the dismissal of an indictment. The nature of the government's proof with regard to the organization to which appellee belongs is a matter to be considered during and after the trial (if there is a conviction). Appellee's supposition that he will be precluded at trial from contesting "stale" determinations is plainly premature. And the claim that Section 5(a)(1)(D) is a bill of attainder within the meaning of this Court's decision in *United States* v *Brown*, 381 U.S. 437 (Motion to Affirm, pp. 13–14), overlooks the fact that this statute, unlike the one in *Brown*, does not mention the Communist Party by name. Indeed, in the *Brown* decision this Court observed that "the Subversive Activities Control Act did not name the Communist Party but rather set forth a broad definition, which would permit the Party to escape the prescribed deprivations in the event its character changed." 381 U.S. at 452, n. 26.

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted.

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